HAYES H. GABLE, III
Attorney at Law - SBN 60368
428 J Street, Suite 354
Sacramento, California 95814
Telephone: (916) 446-3331
Facsimile: (916)447-2988

THOMAS A. PURTELL
Attorney at Law - SBN 26606
430 Third Street
Woodland, CA 95695
Telephone: (530) 662-9140
Facsimile: (530) 662-3018

Attorneys for Defendant
MARCO ANTONIO TOPETE

YOLO COUNTY SUPERIOR COURT

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff, vs. **MARCO ANTONIO TOPETE,** Defendant.	Case No.: CR08-3355 Department No. 6 NOTICE OF MOTION AND MOTION TO PRECLUDE DEATH QUALIFICATION VOIR DIRE. Trial Motion No. 1

TO: THE DISTRICT ATTORNEY OF YOLO COUNTY

PLEASE TAKE NOTICE that on May 17, 2010, or as soon thereafter as the matter may be heard, in Department 6 of the above entitled court, defendant, Marco Antonio Topete, by and through attorneys, Hayes H. Gable, III and Thomas A. Purtell will move the court for an order precluding "death qualification" voir dire.

This motion seeks to preclude "death qualification" voir dire because it violates Mr. Topete's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States

Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution, including, but not limited, to his rights to a fair trial, confront evidence, to assistance of counsel, to equal protection and to due process.

This motion is based on this notice, the pleadings, records, and files in this action, the attached memorandum of points and authorities and oral argument to be presented at the hearing.

DATED: May 17, 2010

HAYES H. GABLE, III

THOMAS A. PURTELL
Attorneys for Defendant
MARCO ANTONIO TOPETE

HAYES H. GABLE, III
Attorney at Law - SBN 60368
428 J Street, Suite 354
Sacramento, California 95814
Telephone: (916) 446-3331
Facsimile: (916)447-2988

THOMAS A. PURTELL
Attorney at Law - SBN 26606
430 Third Street
Woodland, CA 95695
Telephone: (530) 662-9140
Facsimile: (530) 662-3018

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YOLO COUNTY SUPERIOR COURT

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff, vs. **MARCO ANTONIO TOPETE,** Defendant.	Case No.: CR08-3355 Department No. 6 MOTION TO PRECLUDE DEATH QUALIFICATION VOIR DIRE.

TO: THE DISTRICT ATTORNEY OF YOLO COUNTY

ARGUMENT

I.

A. The Death Qualification of Juries is Unconstitutional.

"A 'death qualified' jury is one from which prospective jurors have been excluded for cause in light of their inability to set aside their views about the death penalty that would prevent or substantially impair the performance of their duties as jurors in accordance with their instructions and oath." (Buchanan v. Kentucky (1987) 483 U.S. 402, 408, fn.6, internal citations

and quotations omitted.) Death qualification inquires "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (Wainwright v. Witt (1985) 469 U.S. 410, 424; Adams v. Texas (1980) 448 U.S. 38, 45.) If a juror's ability to perform his or her duties is substantially impaired under this standard, he or she is subject to dismissal for cause. As such, death qualification, in general and as will be applied in this case, violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution.

The death qualification test focuses on the abstract, conscientious, or religious scruples of prospective jurors, not case specific considerations. A scruple is "an ethical consideration or principle that inhibits action." (*Merriam-Webster's Collegiate Dictionary* 10th ed. (1995).) Accordingly, the "views" that matter are, ultimately, moral ones.

The penalty phase jurors' duty entails making moral and sympathetic judgments. At each stage, the jury makes moral determinations encompassing the statutory mitigating factors and "any other 'aspect of [the] defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death," Lockett v. Ohio (1978) 438 U.S. 586, 604, whether or not related to the offense for which he is on trial.

The jury's duty at the penalty phase is quite different from a jury's guilt phase duty. Guilt phase juries find facts and apply the law to those facts. Unlike the guilt phase determination, the penalty phase determination is inherently moral and normative, not factual. Unlike the guilt determination, where appeals to the jury's passions are inappropriate, in making the penalty decision, the jury must make a moral assessment of all relevant facts as they reflect on its decision. In commenting on this point, the California Supreme Court wrote: "As the

representative of the community at large, the jury applies its own moral standards to the aggravating and mitigating evidence to determine if death or life is the appropriate penalty for that particular offense and offender." (People v. Mendoza (2000) 24 Cal.4th 130, 192.)

This difference in a juror's duty creates a serious, underlying problem in the death qualification standard as it applies to the death penalty scheme. Under the standard, a potential juror is removed for cause if their moral views will substantially impair their duty. However, their duty is to make a "moral and normative" judgment, and, by law, they are required to make "moral and sympathetic" determinations.

Death qualification was approved by the Supreme Court in Witherspoon v. Illinois (1968) 391 U.S. 510. (See also Hovey v. Superior Court (1980) 28 Cal.3d 1 superseded by statute on other grounds as stated in People v. Waidla (2000) 22 Cal. 4th 690, 713.) Under Witherspoon, a juror could be excused for cause if he or she would "*automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case," or "his attitude toward the death penalty would prevent [him] from making an impartial decision as to the defendant's *guilt*." (Witherspoon, *supra*, 391 U.S. at 522, emphasis in original.) These standards were refined in Adam v. Texas, 448 U.S. at 45 and then clarified further in Wainwright v. Witt, 469 U.S. at 424-426, which allows for removal of a juror whose ability to perform his duties are substantially impaired."

While the "substantially impaired" test may be proper in the context where the jury has its typical role of finding facts, that is not the role of the penalty phase jury. As the California Supreme Court observed:

> It is not simply a finding of facts which resolves the penalty decision, but the jury's moral assessment of those facts as they reflect on whether defendant should be put tot death. The jury must be free to reject death if it decides on the basis of

any constitutionally relevant evidence or observation that it is not the appropriate penalty.

(People v. Brown (1985) 40 Cal.3d. 512, 539-540, citations, quotations, and footnotes omitted.) A California death penalty jury does not make a narrow factual determination, like the typical jury alluded to in Witt's traditional test, but instead it makes a broad "moral and normative" determination.

The Supreme Court substituted the Witt standard for the Witherspoon standard because sentencing juries "could no longer be invested with such [unlimited] discretion [as was the case in Witherspoon]," and "that many capital sentencing juries are now asked specific questions, often factual, the answers to which will determine whether death is the appropriate penalty." (Wainwright v. Witt, *supra*, 469 U.S. at 421-422.) The Supreme Court adopted a test that was "in accord with traditional reasons for excluding jurors" in non-death penalty cases. (Ibid. at 423.) The Court noted that the jury was "given broad discretion to decide whether or not death is 'the proper penalty' in a given case." (Witherspoon v. Illinois, *supra*, 391 U.S. at 519.) However, since a California death penalty jury is also given broad discretion in determining whether death is the appropriate penalty, the Witt test is not applicable to the California death penalty scheme.

In Witt, the Supreme Court determined that "Witherspoon is not grounded in the Eighth Amendment's prohibition against cruel and unusual punishment, but in the Sixth Amendment." (Wainwright v. Witt, *supra*, 469 U.S. 412, 423.) The Court in Witt erroneously considered Witherspoon as a Sixth Amendment case, stating at one point that the "jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments." (Witherspoon v. Illinois, *supra*, 391 U.S. at 518.) The California Supreme Court has opined that the "precise constitutional basis for the Witherspoon holding is not entirely

certain." (Hovey v. Superior Court, *supra*, 28 Cal.3d at 11, fn.7 [noting that although Witherspoon did mention the "impartial jury" requirement of the Sixth Amendment, "this interpretation does not withstand scrutiny" since that right did not yet apply to the states].) The California Supreme Court concluded that it appeared that Witherspoon involved "due process, as seen through the filter of Sixth Amendment values." (Ibid.) Significantly,

> one of the most important functions any jury can perform in making [the death penalty] selection is to maintain a link between contemporary community values and the penal system – a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society."

(Witherspoon v. Illinois, *supra*, 391 U.S. 510, 520, fn.15, quoting Trop v. Dulles, 356 U.S. 86, 101.) Trop's "evolving standards of decency" language is a cornerstone of Eighth Amendment death penalty jurisprudence. Under the Eighth Amendment, the Supreme Court determines whether a punishment is cruel and unusual, i.e. whether the evolving standards of decency have reached the point where society deems the punishment to be cruel and unusual. (See, e.g., Kennedy v. Louisiana (2008) 554 U.S. __, 128 S.Ct. 2641.)

The Supreme Court has held that one of the best sources of objective information on such evolving standards are verdicts of jurors who have the responsibility of deciding whether to impose the punishment. (See, e.g., Furman v. Georgia (1972) 408 U.S. 238, 278-279, concurring op. of J. Brennan; ibid. at 439-442, Powell, J., Burger, C.J., Blackmun, J., and Rehnquist, J.) The process of analyzing jury determinations as evidence of the "evolving standards of decency" is one of the few, long standing, consistent areas of Supreme Court death penalty law. In fact, three Supreme Court justices recently wrote separately to emphasize their belief that the actions of sentencing juries, along with legislative judgments are the *sole reliable factors* in the

"evolving standards" analysis. (See Atkins v. Virginia (2002) 536 U.S. 304, 322-325, 328, C.J,. Rehnquist, J. Scalia, J. Thomas dissenting.) Chief Justice Rehnquist wrote:

> Our opinions have also recognized that data concerning the actions of sentencing juries, though entitled to less weight than legislative judgments, "'is a significant and reliable index of contemporary values,'" Coker v. Georgia, 433 U.S. 584, 596, 53 L. Ed. 2d 982, 97 S. Ct. 2861 (1977) (plurality opinion) (quoting Gregg, *supra*, at 181), because of the jury's intimate involvement in the case and its function of "'maintaining a link between contemporary community values and the penal system,'" Gregg, supra, at 181 (quoting Witherspoon v. Illinois, 391 U.S. 510, 519, 20 L. Ed. 2d 776, 88 S. Ct. 1770, 46 Ohio Op. 2d 368, n. 15 (1968)). In Coker, 433 U.S. at 596-597, for example, we credited data showing that "at least 9 out of 10" juries in Georgia did not impose the death sentence for rape convictions. And in Enmund v. Florida, 458 U.S. 782, 793-794, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 (1982), where evidence of the current legislative judgment was not as "compelling" as that in Coker (but more so than that here), we were persuaded by "overwhelming [evidence] that American juries . . . repudiated imposition of the death penalty" for a defendant who neither took life nor attempted or intended to take life.
>
> In my view, these two sources -- the work product of legislatures and sentencing jury determinations -- ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment. They are the only objective indicia of contemporary values firmly supported by our precedents. More importantly, however, they can be reconciled with the undeniable precepts that the democratic branches of government and individual sentencing juries are, by design, better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments.

(Ibid. at 323-324.) This opinion confirms the crucial role that death penalty juries have in providing the data needed by the courts to assess the evolving standards of decency.

Since juries represent community values, their penalty verdicts inform the judicial determination of the evolving standards. The California Supreme Court has stated that "[a] penalty jury can speak for the community only insofar as the pool of jurors from which it is drawn represents the full range of relevant community attitudes." (Hovey v. Superior Court, *supra*, 28 Cal.3d at 73.) Nonetheless, potential jurors are removed from serving on death penalty juries *because of* their views on the death penalty. Death qualification, which disqualifies certain

members of the community, breaks the essential link between community values and the criminal justice system. By excluding certain community members from penalty deliberations, their community values will never be represented in jury sentencing determinations, "the indicators" by which the courts ascertain contemporary standards of decency.

"Evolving standards of decency" are constantly changing. Compare Penry v. Lynaugh (1989) 492 U.S. 302, holding that society had yet to evolve to the point where the death penalty for the mentally retarded is unconstitutional, and Atkins v. Virginia, *supra*, 536 U.S. 304, holding that society has evolved to the point where the death penalty for the mentally retarded is unconstitutional. Similarly, in Roper v. Simmons (2005) 543 U.S. 551, the Supreme Court recently held that it is unconstitutional for a state to execute a person who was under the age of eighteen at the time of the offense and thus overruled Stanford v. Kentucky (1989) 492 U.S. 361, which was decided only sixteen years before. In order to assess the changing standards, the courts must have accurate and representative data of sentencing values. Death qualification skews the data provided by jury sentencing determinations and thus renders it impossible for the courts to fairly assess evolving standards concerning the constitutionality of the death penalty.

Thus, death qualification violates principles of due process under the Fourteenth Amendment. It results in an unconstitutional death penalty scheme. Based on statute, jury instructions, and Court opinions, the current, "substantially impairs" test is irrational and violates the Fifth, Sixth, Eighth, and Fourteenth Amendments article I, sections 7, 15, 16, and 17 of the California Constitution. Death qualification is contrary to long-standing jurisprudence that death penalty juries represent the values of the community and that this function is crucial to provide information from which the courts discern evolving standards of decency.

B. Death Qualification Violates Equal Protection and Due Process

Death qualification results in capital defendants having their guilt or innocence determined by juries that are materially different from juries deciding the same issues in non-capital trials. The Supreme Court has recognized that "'death qualification' in fact produces juries *somewhat* more 'conviction prone' than 'non-death-qualified' juries." (Buchanan v. Kentucky, *supra*, 483 U.S. at 415, fn. 16, quoting Lockhart v. McCree (1986) 476 U.S. 162, 173.) It also produces juries prone to impose a death verdict. (See Haney, Hurtado, and Vega., *"Modern" Death Qualification: New Data on Is Biasing Effects* (1994) 18 Law & Hum. Behav. 619, 631 ["Death-qualified juries remain significantly different from those that sit in any other kind of criminal cases."].)

The penalty phase determination implicates several fundamental constitutional rights. A capital defendant has a constitutional right to a jury trial at the penalty phase under the Sixth Amendment. (Ring v. Arizona (2002) 536 U.S. 584.) Life is also a fundamental right for purposes of the Sixth Amendment because it is the jury that ultimately deprives capital defendants of this fundamental right. By providing different schemes for selecting juries in capital and non-capital cases, the criminal justice system discriminates between two classes of defendants. Since the different schemes result in juries that are more "conviction prone" for capital defendants, this discrimination impinges on the fundamental right to an impartial jury at the guilt phase. It also impinges on the fundamental right to life at both the guilt and penalty phases.

Here, the government cannot meet this burden in justifying death qualification at either the guilt or penalty phase. First, death qualification is not "necessary," i.e. drawn with precision, narrowly tailored, and uses the least drastic means. (See Dunn v. Blumstein (1972) 405 U.S.

330; Wygant v. Jackson Bd. of Education (1986) 476 U.S. 267, 280, fn.6.) Whatever interest the federal government has for having death qualification at the penalty phase, it cannot be said that death qualification is "necessary" at the guilt phase. In California, the court has discretion to impanel two juries for capital cases. (Cal. Penal Code 190.4(c); People v. Carpenter (1997) 15 Cal.4th 312, 369-370, superseded by statute on other grounds as stated in Verdin v. Superior Court (2008) 43 Cal. 4th 1096, 1106-1107.) One jury for the guilt phase, as a typical guilt jury is chosen, and a second jury for the penalty phase.

Second, death qualification denies fundamental rights based upon arbitrary and disparate "standards." (Bush v. Gore (2000) 531 U.S. 98.) Where a single entity has the power to assure uniformity in implementing a fundamental right, "there must be at least *some* assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." (See Ibid. at 109 [emphasis added].) Since Congress and California have not authorized death qualification by statute, it has not enacted any standards for death qualification. It has been left up to the courts to set the standards. The Supreme Court has not done so. Without uniform standards, trial judges are free to use whatever standards they choose in ascertaining whether a cause challenge should be granted or denied. As a result, trial courts have been given unlimited, unguided discretion on the issue of death qualification.

This discretion inevitably results in non-uniform standards and unequal treatment just like the disparate treatment of voters ruled unconstitutional in Bush v. Gore. Trial courts have been given no more guidance on how to death qualify juries than the county canvassing boards in Florida were given on how to count "hanging chads." These non-uniform standards result in wildly disparate and arbitrary treatment of similarly situated capital defendants. Every capital defendant's jury is chosen by different standards, just as every voter in Florida's ballot was

judged by different standards. (Bush v. Gore, *supra*, 531 U.S. at 109.) When a right as important and fundamental as the right to a jury, which decides whether you live or die, is at stake, such unequal treatment is unconstitutional.

Death qualification impacts several fundamental rights. California courts cannot justify its infringement on these rights, it's unequal treatment of similarly situated people with respect to these rights, or its lack of standards for enforcing these rights, under the Constitution.

C. Current Empirical Studies Prove that Death Qualification Is Unconstitutional.

In Lockhart v. McCree, *supra*, 476 U.S. at 165, the Supreme Court relied on available statistical data and rejected a claim that death qualification violated a defendant's Sixth and Fourteenth Amendment rights to have guilt or innocence determined by an impartial jury selected from a representative cross section of the community. (Ibid. at 167.) However, new evidence establishes that the factual basis on which Lockhart rests is no longer valid, and that its decision was based on faulty science[1] and improper logic. The questions raised in Lockhart must be reevaluated in light of the new evidence.

As one expert opined, the most telling aspect of the scientific data on death qualification is that it now consistently points to the conclusion that death qualification results in a jury that is prone to convict and vote for death. (Seltzer et al., *The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example* (1986) 29 How. L.J. 573.) A more

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[1] As one commentator stated: "The majority opinion in Lockhart v. McCree demonstrates the inability of the highest court in the land to accurately interpret and apply social science data. The tragedy here – and there is a far reaching one – is that the Supreme Court has licensed the imposition of death sentences by juries who are far more likely to convict than juries empanelled in any other type of criminal case." (Seltzer et al., *The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example* (1986) 29 How. L.J. 571, 573.)

recent study updated the past research on death qualification based on numerous changes in society and the law, including the increase in support for the death penalty and the Supreme Court's decision in Morgan v. Illinois (1992) 504 U.S. 719, which required "life qualification," or the removal of the automatic death jurors. (See Haney et al., *"Modern" Death Qualification: New Data on Its Biasing Effects* (1994) 18 Law & Human Behavior 619, 619-622.) The study was "likely the most detailed statewide survey on Californians' death penalty attitudes ever done." (Ibid. at 623, 625.) It found that: "Death-qualified juries remain significantly different from those that sit in any other kind of criminal case." (Ibid. at 631.) These studies now show that death qualification violates the Sixth Amendment.

1. Lockhart's Factual Basis is No Longer Sound.

The Lockhart opinion has been criticized for its analysis of both the data and the law related to death qualification. (See, e.g., Smith, *Due Process Education for the Jury: Overcoming the Bias of Death Qualification Juries* (1989) 18 Sw. U.L.Rev. 493, 528.) The Court's analyses in Lockhart was "characterized by unstated premises, fallacious argumentation and assumptions that are unexplained or undefended." (Thomas, *Death Qualification After Wainwright v. Witt and Lockhart v. McCree* (1989) 13 Law & Human Behavior 185, 202.) The opinion is "poorly reasoned and unconvincing both in its analysis of the social science evidence and its analysis of the legal issue of jury impartiality." (Byrne, *Lockhart v. McCree: Conviction-Proneness and the Constitutionality of Death-Qualified Juries* (1986) 36 Cath. U.L. Rev. 287, 313.) The opinion was a "fragmented judicial analysis," representing an "uncommon situation where the Court allows financial considerations to outweigh an individual's fundamental constitutional right to an impartial and representative jury." (Ibid.; see also Moar, *Death Qualified Juries in Capital Cases: The Supreme Court's Decision in Lockhart v. McCree* (1988)

19 Colum. Hum. Rts. L. Rev. 369, 374 [detailing criticism of the Court's analysis of the scientific data]; Bersoff & Glass, *The Not-So Weisman: The Supreme Court's Continuing Misuse of Social Science Research* (1995) 2 U. Chi. L. Sch. Roundtable 279; Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology* (1990) 66 Ind. L.J. 137.)

This court should not defer to the general holdings in Lockhart in deciding the numerous constitutional issues at stake here. Because the "constitutional facts" upon which Lockhart was based are no longer correct, the Supreme Court's holding is no longer controlling under the federal constitution. (See United States v. Caroline Products (1938) 304 U.S. 144, 153; W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (U.S. 1943) This court needs to review the new data and reevaluate this issue and upon review of the evidence, should find death qualification unconstitutional.

a. Misinterpretation of the Scientific Data.

Despite the fact that the studies presented in Lockhart were carried out in a "manner appropriate and acceptable to social or behavioral scientists," the Supreme Court categorically dismissed them. (Smith, *supra*, 18 Sw. U.L. Rev. at 537.) This improper scientific assessment was key, yet fatal to Lockhart's holding. Moreover, the Supreme Court did not look at the studies as a whole body of data, allowing it to ignore the studies' powerful cumulative effect. (Ibid.) When the Supreme Court found a "'flaw' in a study, or a group of studies, [the Supreme Court] dismissed it from further consideration, never considering that alternative hypotheses left open by shortcomings in studies of one type might be ruled out by studies of another type." (Thompson, *supra*, 13 Law & Human Behavior at 195.) Any study that was deemed less than definitive was wrongly thrown out as completely uninformative. (Ibid.)

"The Court's adamant refusal to acknowledge the strength of the evidence before it casts grave doubts upon its ultimate holding in Lockhart." (Ibid.) As one researcher concluded:

> The fact that the Supreme Court can misrepresent and grossly misinterpret the findings in this study renders the Court's interpretation of all the empirical evidence before it in [Lockhart v.] McCree suspect. Social science research cannot provide answers with *absolute* certainty. We will never know precisely how many convicted defendants in death penalty cases would have been acquitted if death qualification did not take place prior to the guilt-innocence stage.

(Seltzer et al., *supra*, 29 How. L.J. at 590.) The Supreme Court "erred in its rejection of the empirical evidence." (Moar, *supra*, 19 Colum. Hum. Rts. L. Rev. at 396.) "Although there are valid criticisms of some of the Witherspoon studies and the potential effects studies, none of their independent weaknesses appear to justify the Court's rejection of the studies' significance for McCree's claim that the death qualification procedure tends to produce guilt-prone juries." (Ibid. at 382.)

In Lockhart, the Supreme Court was presented with over fifteen years of scholarly research on death qualification using a "wide variety of stimuli, subjects, methodologies, and statistical analyses." (Ibid. at 386-387.) From both a scientific and legal perspective, "[g]iven the seriousness of the constitutional issues involved [] and the extent and unanimity of the empirical evidence, it is hard to justify [the Court's] superficial analysis and rejection of the social science research." (Ibid. at 387.) The Supreme Court "ignored the evidence which indicates that a death qualified jury, composed of individuals with pro-prosecution attitudes, is more likely to decide against criminal defendants than a typical jury which sits in all noncapital cases." (Byrne, *supra*, 36 Cath. U.L. Rev. at 315.) The Supreme Court's analysis of the statistics cannot be relied upon by this court in deciding this issue.

b. Incorrect Legal Observations.

The Court in Witherspoon had all but accepted that, once the "fragmentary" scientific data on death qualification's effect on the guilt phase was solidified, the Court would act to prevent impartial guilt phase juries. "It seemed only inadequate proof of 'death-qualified' juror bias caused the court to uphold Witherspoon's guilty verdict." (Smith, *supra*, 18 Sw. U.L. Rev. at 518.) This court should not follow this faulty lead, but should instead construe and apply the federal and California Constitutions properly. "The Court's holding in Lockhart infers that the Constitution does not guarantee the capital defendant an 'impartial jury' in the true meaning of the phrase, but merely a jury that is capable of imposing the death penalty if requested to do so by the prosecution." (Peters, *Constitutional Law: Does "Death Qualification" Spell Death for the Capital Defendant's Constitutional Right to an Impartial Jury?* (1987) 26 Washburn L.J. 382, 395.) This is not the meaning of impartiality that fits within the federal and California Constitutions, nor is it the proper one.

2. The Scientific Evidence.

a. Post-Lockhart Data on the Guilt Phase Jury

All Scientific research on death qualification shows that death qualification results in juries that are more prone to convict. (Moar, *supra*, 19 Colum. Hum. Rts. L. Rev. at 382-383.) "It is most impressive that every study, either directly or indirectly, suggests that the death qualification procedure tends to produce conviction-prone juries." (Ibid. at 395.) "In fact, there are no competent empirical studies which reach contrary conclusions." (Seltzer et al., *supra*, 29 How. L.J. at 581.)

On the whole, the major studies since 1978 "conclusively demonstrate that death qualified juries are conviction-prone, biased in favor of the prosecution, and under-representative

of the communities from which they are drawn." (Ibid. at 577.) This study found that excluded jurors were less conviction prone than those who survived death qualification. (Ibid. at 603-604.) "Seltzer concluded by finding that his study, "combined with the body of empirical data on death qualification, conclusively shows that the removal for cause of Witherspoon excludables results in a petit jury that is prone to convict and under-representative of the community from which it is drawn." (Ibid. at 607.)

b. Data on Penalty Phase Jury Studies.

Studies have consistently demonstrated that death qualification drastically affects the penalty determination. "[C]apital juries do not now fully represent the community; they are more likely to accept prosecution evidence than defense evidence and are more likely to believe in harsh measures for criminals than is the population as a whole." (Smith, *supra*, 18 Sw. U.L. Rev. at 509; *see also* Allen et al., *Impact of Juror Attitudes About the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-analysis* (1998) 22 Law & Hum. Behav. 715, 725 [finding that a death qualified jury is more likely to invoke death penalty].)

Following Lockhart, jurors' views of aggravating and mitigating circumstances were studied to determine if any relationship existed between belief in the death penalty and a juror's attitude toward aggravating and mitigating evidence. (Luginbuhl & Middendorf, *supra*, 12 Law. & Hum. Behav. 263, 267.) The result turned a general principle supporting death qualification on its head – the principle that potential jurors who oppose the death penalty will not be able to consider aggravating evidence properly and thus cannot obey their oaths. This research shows that the opposite is true.

The study found that those who opposed or supported the death penalty did not differ in their perception of aggravating circumstances. (Ibid. at 270.) However, there was a "strong

relationship between opposition to the death penalty and one's consider of mitigating circumstances." (Ibid.) As death penalty opposition increased, the consideration of mitigation evidence increased. (Ibid.) The researchers concluded that: "while most people can understand and accept that there are some circumstances that make a particular murder 'worse' and merit harsher punishment for the defendant, only those with strong opposition to the death penalty are willing to consider favorable evidence (or facts) that supports statutory or non-statutory mitigating circumstances and that points toward a more merciful sentence." (Ibid. at 271.) Death penalty opponents can consider aggravators, but death penalty proponents have difficulty considering mitigation. This result is especially disturbing since there is a constitutional right to have sentencers consider mitigation, but no such equivalent for aggravation. A second study verified these results when the proper legal standards for exclusion were used, including the exclusion of automatic death penalty jurors as required by Hovey.[2] (Ibid. at 271-272.)

The study also demonstrated that death qualification results in jurors who may not be able to consider non-statutory mitigating circumstances. (Ibid. at 277.) Importantly, the researchers opined that these general attitudes will influence the jurors' final determination of the death penalty. (Ibid. at 277-279 [explaining individual schema and juror's behavior].) The researchers found that a death-qualified jury "may well be more likely to impose a penalty of death" since they are oriented toward accepting aggravating circumstances and rejecting mitigating circumstances. (Ibid. at 279; see also Craig Haney, *Exoneration and Wrongful Condemnations:*

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[2] This study addresses the criticisms of the prior case law. Not only does it address the evidence as to death qualification's effect on the penalty phase, but used actual jurors, which was purportedly an issue for the Supreme Court in Lockhart. It also addressed the automatic death penalty jurors of the "Hovey problem." This study also removed "nullifiers" from its analysis, which was anther potential issue noted by Lockhart. (See ibid.. at 274.)

Expanding the Zone of Perceived Injustice in Death Penalty Cases (2006) 37 Golden Gate U.L. Rev. 131 ["Death-qualified jurors also weigh and evaluate penalty phase evidence differently. Specifically, they are more likely to endorse numerous aggravating factors while diminishing the significance of both statutory and non-statutory mitigation."]; Susan Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation* (2006) 38 Ariz. St. L.J. 769, 790 ["Nearly half of the CJP [Capital Jury Project] respondents admitted to deciding the proper punishment before they had heard a single piece of evidence on the issue of punishment. Of these the overwhelming majority were 'absolutely convinced' and almost all of those remaining were 'pretty sure.'"]; Brooke M. Butler & Gary Moran, *The Role of Death Qualification in Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials* (2002) 26 Law &Hum. Behav. 175, 183 ["[D]efendants in capital trials are subjected to juries that are oriented toward accepting aggravating circumstances and rejecting mitigating circumstances."]; John Blume et al., *Probing "Life Qualification" Through Expanded Voir Dire* (2001) 29 Hofstra Law. Rev. 1209, 1228 ["[Capital Jury Project] data convincingly demonstrate that a substantial number of empaneled capital jurors are indeed 'mitigation impaired.'"]; Marla Sandys, *Cross-Overs – Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines* (1995) 70 Ind. L. j. 1183, 1220-1221 [same]; Constanza & Constanza, *Jury Decision Making in the Capital Penalty Phase* (1992) 16 Law & Hum. Behav. 185 [same].)

c. Data on Death Qualification's Impact on Race, Gender, and Religion.

The Supreme Court in Lockhart did not address whether death qualification had a negative impact on race, gender, and religion in jury composition. These issues are of

constitutional dimension and research, now available, compels a finding that death qualification has an adverse effect on these important classes.

Numerous studies have shown that "proportionately more blacks than whites and more women than men are against the death penalty." (Moar, *supra*, 19 Colum. Hum. Rts. L. Rev. at 386.) Death qualification "tends to eliminate proportionately more blacks than whites and more women than men from capital juries," impacting two distinctive groups under the fair cross-section analysis. (Ibid. at 388.) Death qualification has a "detrimental effect on the representation of blacks and women on capital juries." (Ibid. at 396.)

Professor Seltzer found that "the process of death qualification results in juries which under-represent blacks." (Sletzer et al., *supra*, 29 How. L.J. at 604.) Luginbuhl and Middendorf found that there is significant sex, race, age, and education effects on death penalty attitudes. (Luginbuhl & Middendorf, *supra*, 12 Law. & Hum. Behav. At 269.) They found that females were significantly more opposed to the death penalty than males. (Ibid.) They also found a significant race effect. (*Ibid.*)

d. Prosecutor Misuse of Death Qualification.

Research has shown that a "prosecutor can increase the chances of getting a conviction by putting the defendant's life at issue." (Thompson, *supra*, 13 Law & Human Behavior at 199, citing Gross, *Determining the Neutrality of Death-Qualified Juries: Judicial Appraisal of Empirical Data* (1984) 8 Law & Hum. Behav. 7, 13.) "The ability to screen jurors may invite prosecutorial gamesmanship, tempting prosecutors to charge cases as capital crimes solely to produce a 'friendlier' jury. In his 1986 dissent [in Lockhart], Justice Marshall noted that it was all but impossible to prove that a prosecutor had engaged in this sort of 'tactical ruse.' Though facts suggesting the tactic have been present in at least a half-dozen cases, no court has

overturned a conviction on this ground." (Liptak, *Facing a Jury of (Some of) One's Peers*, N.Y. Times, July 20, 2003, Section 4.)

Prosecutors now acknowledge that death qualification skews the jury and that they use this unconstitutional practice to their advantage in obtaining conviction-prone juries. (*See* Garvey, *The Overproduction of Death* (2000) 100 Colum. L. Rev. 2030, 2097 & fns. 163-164, quoting Rosenberg, *Deadliest D.A.*, N.Y. Times, July 16, 1995, Magazine at 42. [3]) The prosecutors use this voir dire practice to eliminate the segment of the jury pool that is most likely to be critical of police and forensic testimony and most likely to discount the "beyond a reasonable doubt" standard. (Ibid.)

In Lockhart, the Supreme Court declined to consider the prosecutorial motives underlying death qualification, noting that the petitioner had not argued that death qualification was instituted as a means "for the State to arbitrarily skew the composition capital-case juries." (Lockhart v. McCree, *supra*, 476 U.S. at 176.) The dissent in Lockhart predicted that "[t]he State's mere announcement that it intends to seek the death penalty if the defendant is found guilty of a capital offense will, under today's decision, give the prosecution license to empanel a

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[3] The Rosenberg article quotes "various former and current Pennsylvania prosecutors explaining the Philadelphia district attorney's practice of seeking the death penalty in nearly all murder cases as self-consciously designed to give prosecutors 'a permanent thumb on the scale' enabling them to 'use everything you can' to win, including . . . 'everyone who's ever prosecuted a murder case wants a death qualified jury,' because of the 'perception . . . that minorities tend to say much more often that they are opposed to the death penalty,' so that '[a] lot of Latinos and blacks will be [stricken from capital juries as a result of] these [death qualification] questions.'" (Tina Rosenberg (1995) *Deadliest D.A.*, N.Y. Times, July 16, 1995, at 42.)

jury especially likely to return that very verdict." (Lockhart v. McCree, *supra*, 476 U.S. at 185, dis. opn. of Marshall, J., Brennan, J., & Stevens, J.)

D. Death Qualification Violates the Eighth Amendment.

Death qualification skews the jury so that it is more conviction prone and more prone to inflict death upon capital defendants. Non-capital defendants do not face such skewed juries. This result is unacceptable under the Eighth Amendment.

The Eighth Amendment requires "heightened reliability" in capital cases because "death is different."

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

(Woodson v. North Carolina (1976) 428 U.S. 280, 305.) Since death qualification impacts the jury to make a death sentence more likely, it cannot survive the "heightened reliability" requirement. The Supreme Court has recognized the same principle when it comes to guilt determinations.

> To insure that the death penalty is indeed imposed on the basis of reason rather than caprice or emotion, we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination.

(Beck v. Alabama (1980) 447 U.S. 625, 638, citations, quotations, and footnote omitted.) Instead of the "utmost care" and "heightened reliability," capital defendants are provided with juries that are not allowed in any other circumstance. Death qualification only targets capital defendants. It results in capital defendants receiving juries at both phases that are far less "impartial" than juries provided to any other defendant. In his dissent from the denial of

certiorari in a death penalty case, Justice Blackmun, who had previously upheld the constitutionality of the death penalty, concluded that the death penalty system "fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution" and that it had become apparent that states could not implement the death penalty in a constitutional manner. (Callins v. Collins (1994) 510 U.S. 1141, 1144-1146, dis. opn. of denial of cert. Blackmun, J.) In his opinion he explained:

> Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all and, despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. . . .
>
> From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored -- indeed, I have struggled -- along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies.

(Callins v. Collins (1994) 510 U.S. 1141, 1143-1146, dis. opn. of denial of cert. Blackmun, J., citations and footnotes omitted.)

Accordingly, death qualification violates the "heightened reliability" requirement of due process and the Eighth Amendment because it is utterly "cruel and unusual" to put a human being on trial for his life yet systemically force him to face a jury that is prone to convict and condemn him to die by excluding all of the jurors who would be open to the defense evidence.

E. The Process of Death Qualification is Unconstitutional.

Even if this Court does not condemn death qualification in general, the process of death qualification nevertheless in unconstitutional. The Supreme Court did not reach this issue in Lockhart.

"The voir dire phase of the trial represents the 'jurors' first introduction to the substantive factual and legal issues in a case.' The influence of the voir dire process may persist through the whole course of the trial proceedings." (Powers v. Ohio (1991) 499 U.S. 400, 412, quoting Gomez v. United States (1989) 490 U.S. 858, 874.) As detailed in recent studies, the process of voir dire death qualification indoctrinates jurors to a pro-conviction and pro-death view. The result is that particular views on guilt and the penalty are removed from the panel.

An even more serious problem occurs when the Court allows jurors to be indoctrinated on the particular facts of the case before any evidence has been presented. This pre-trial bias violates the principles of fundamental fairness and due process. The very process of death qualification will influence the deliberative process and the mind set of the jurors concerning their responsibilities and duties. The process of death qualification voir dire thus violates the Sixth Amendment and article I, sections 15 and 16 of the California Constitution. Any verdict reached by a jury chosen in this manner cannot stand since a skewed jury is a structural error.

F. Death Qualification Violates the Right to a Jury Trial.

In Taylor v. Louisiana (1975) 419 U.S. 522, 530-531, the Supreme Court identified three purposes underlying the Sixth Amendment right to a jury trial. Death qualification defeats all three purposes underlying the constitutional right.

First, "the purpose of a jury is to guard against the exercise of arbitrary power – to make available the commonsense judgment of the community as a hedge against the overzealous or

mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge. (Ibid.) Death qualification fails to guard against "the exercise of arbitrary power." Potential jurors who tend to question the prosecution, and would thus keep their power in check, are the very people excluded from the jury via death qualification.

Death qualification makes the "commonsense judgment of the community" unavailable. The evidence now shows that a death qualified jury fails to represent the judgment of the excluded community members.

Death qualification also removes the constitutionally required "hedge against the overzealous or mistaken prosecutor" or "biased response of a judge." (Ibid.) Evidence shows that prosecutors intentionally use death qualification to remove potential jurors so that there is no "hedge" to prevent their overzealousness.

The second purpose of the jury trial is to preserve public confidence. "Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage, but is also critical to public confidence in the fairness of the criminal justice system." (Ibid.) Death qualification fails to preserve confidence in the system, and discourages community participation. (See, e.g., Moller, *Death-Qualified Juries Are the 'Conscience of the Community'?* (May 31, 1988) L.A. Daily Journal at 4, Col. 3 [noting the "Orwellian doublespeak" of referring to a death qualified jury as the "conscience of the community"]; Smith, *supra*, 18 Sw. U.L. Rev. at 499 ["[T]he irony of trusting the life or death decision to that segment of the population least likely to show mercy is apparent."]; Liptak, *Facing a Jury of (Some of) One's Peers*, N.Y. Times, July 20, 2003, Section 4.)

The third purpose is to implement the belief that "sharing in the administration of justice is a phase of civic responsibility." (Taylor v. Louisiana, *supra*, 419 U.S. at 531.) The exclusion

of a segment of the community from jury duty sends a message that the administration of justice is not a responsibility shared equally by all citizens.

Finally, because death qualification undermines the purposes of the Sixth Amendment right to a jury trial, excluding individuals with views against the death penalty from petit juries also violates the fair cross-section requirement. "We think it obvious that the concept of "distinctiveness" must be linked to the [three] purposes of the fair-cross section requirement." (Lockhart v. McCree, *supra*, 476 U.S. at 175.) For these reasons, death qualification violates the Sixth Amendment

II.

COURTS ARE NOT CONSTITUTIONALLY REQUIRED TO DEATH QUALIFY JURORS FOR THE GUILT PHASE.

The Constitutional guarantees of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution run in favor of the accused citizen, not the prosecution. On the basis of the Sixth and Fourteenth Amendments, in Morgan v. Illinois (1992) 504 U.S. 719, the United States Supreme Court held that capital defendants may challenge for cause any juror who would automatically vote for the death penalty because such jurors "will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do." (Ibid. at 729.)

On the other hand, there is no constitutional right to have a person executed, or to any given set of procedures which one believes more likely to bring about an execution. In Lockhart v. McCree (1986) 476 U.S. 162, the United States Supreme Court held that Sixth and Fourteenth Amendments do not "prohibit the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would

prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial." (Ibid. at 165.) However, the Court did not hold that a state *had* to engage in death-qualification of a jury that was going to hear the guilt-phase of the trial. It held that, on the basis of the information and theories before it, the accused was not constitutionally entitled to the form of jury selection he had proposed.

The 1986 majority in Lockhart did not hold that the prosecution has a *right* to the windfall of trying its case on guilt to a death-qualified jury. Instead, it denied that the data established that there *was* such a windfall. Since the prosecution does not have a constitutional right to a death-qualified jury for the guilt phase, this court should preclude death qualification.

CONCLUSION

Death qualification is irrational and unconstitutional. It prevents citizens from performing as jurors in capital cases based on their "moral and normative" beliefs despite the fact that the law specifically requires capital juries to make "moral and normative" decisions. These citizen's voices are eliminated from the data that the courts rely on to determine whether a particular punishment offends evolving standards of decency under the Eighth Amendment. To make matters worse, the jury selection process allows case-specific death qualification whose effect, among others, is to remove jurors who would be highly favorable to specific mitigation evidence in violation of the Eighth Amendment.

Death qualification also violates equal protection and due process. To their detriment, capital defendants receive vastly different juries at the guilt phase in comparison with other defendants. Capital defendants charged with different varieties of capital murder receive vastly different juries at the penalty phase from each other and the Supreme Court has not ensured state wide standards to prevent these results. In addition, since death qualification results in

conviction- and death-prone juries, capital defendants' guilt and penalty determinations are not made with heightened reliability as required by the Eighth Amendment.

The scientific data demonstrates that death qualified juries are far more conviction prone and death prone than any other juries. The data shows that minorities, women, and religious people are disproportionately removed from sitting on juries via death qualification in violation of the Sixth Amendment. Moreover, the government engages in death qualification with the intent of achieving these results. The very process of death qualification skews capital juries to such a degree that they can no longer be said to be impartial and fully represent the community.

All of these errors are present in the instant case. From the beginning to end, death qualification will violate Mr. Topete's rights. The process to be undertaken will be what was expressly prohibited by the Supreme Court:

> In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die.
>
> It is, of course, settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal 'organized to convict.' It requires but a short step from that principle to hold, as we do today, that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death.

(Lockhart v. McCree, *supra*, 476 U.S. at 179, quoting Witherspoon v. Illinois, *supra*, 391 U.S. at 520-521, footnotes and internal citations omitted.) Thus, death qualification in general, and as applied in this particular case will violate Mr. Topete's Fifth, Sixth, Eighth, and Fourteenth

Amendment rights Under the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution.

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Respectfully submitted,

HAYES H. GABLE, III

THOMAS A. PURTELL
Attorneys for Defendant
MARCO ANTONIO TOPETE